

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DUSTIN BENNETT)	
Claimant)	
VS.)	
)	Docket No. 255,335
SCOTT MASONRY, INC.)	
Respondent)	
AND)	
)	
TIG INSURANCE)	
Insurance Carrier)	

ORDER

Claimant appealed the January 31, 2003 Order for Penalties entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on August 5, 2003.

APPEARANCES

Frank D. Taff of Topeka, Kansas, appeared for claimant. Kevin J. Kruse of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board includes the transcript of the January 31, 2003 penalties hearing held before Judge Avery, the record identified in the April 26, 2002 Award and the May 1, 2002 Nunc Pro Tunc Award, and the Division of Workers Compensation's administrative file.

ISSUES

The Judge issued a final award in this claim on April 26, 2002, followed by a May 1, 2002 Nunc Pro Tunc Award. Claimant appealed those awards to this Board which issued its Order on November 27, 2002.

Claimant now requests penalties for the failure to pay four weeks of temporary total disability benefits that were due claimant under a September 29, 2000 preliminary hearing

order. Claimant alleges that he neither received nor endorsed four checks that were issued by respondent's insurance carrier in November 2000. Claimant believes those checks were stolen from his mother's mailbox and fraudulently negotiated by his estranged common-law wife. Claimant also requests penalties as respondent and its insurance carrier failed to timely pay the benefits ordered by this Board in its November 27, 2002 Order.

On January 31, 2003, Judge Avery conducted a penalties hearing. In the January 31, 2003 Order for Penalties, the Judge ruled that claimant was entitled to receive \$100 in penalties as respondent and its insurance carrier had failed to timely pay the benefits awarded in the Board's November 27, 2002 Order. But the Judge denied claimant's request for penalties for the four temporary total disability benefits checks that were allegedly stolen by his wife. The Order for Penalties reads, in part:

The court awards penalties in the amount of \$100.00 for the late payment of the lump sum temporary total check ordered by the Workers Compensation Board. The court declines to award penalties for the allegedly forged checks mailed to claimant's residential address while he was incarcerated. Claimant had received disability checks at the address previously, without objection. Claimant did not notify the insurance company that he was in jail and that his checks should be mailed to a different address.

Claimant contends Judge Avery erred. Claimant's attorney argues that he wrote respondent and its insurance carrier's counsel on October 2, 2000, advising that claimant's temporary total disability benefits checks should be sent to claimant's attorney's office with claimant's attorney as a payee. Claimant's attorney also argues that claimant has never received payment for the four checks in question and, consequently, respondent and its insurance carrier should be required under K.S.A. 44-512a to pay penalties for each check for each week that payment is not made.

Conversely, respondent and its insurance carrier contend claimant's December 2, 2002 demand for payment of the benefits awarded in the Board's November 27, 2002 Order was premature and, thus, the Judge erred in awarding penalties to claimant. Further, respondent and its insurance carrier contend that penalties should not be awarded for the four temporary total disability benefits checks in question as claimant's demands for payment failed to set out those benefits or weeks with specificity.

Respondent and its insurance carrier also argue that they were unaware that claimant was alleging that his signature on the four checks had been forged until shortly before the January 2003 penalties hearing. They also argue that they should not be penalized for the fraud committed by others when the checks in question were endorsed with both claimant's purported signature and claimant's wife's purported signature. Accordingly, respondent and its insurance carrier request the Board to deny claimant's

request for penalties. In the alternative, they request the Board to affirm the January 31, 2003 Order for Penalties.

The only issue before the Board on this appeal is whether claimant is entitled to receive penalties for respondent and its insurance carrier's alleged failure to timely pay benefits.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

1. This is a claim for a March 8, 2000 accident and resulting right ankle injury.
2. While this claim was being litigated, the Judge entered a September 29, 2000 preliminary hearing Order for Compensation in which the Judge ordered respondent and its insurance carrier to pay claimant temporary total disability benefits commencing August 27, 2000, at \$383 per week.
3. On October 2, 2000, claimant's attorney wrote respondent and its insurance carrier's attorney requesting that claimant's checks be sent to claimant's attorney's office with claimant's attorney's name on the checks as a joint payee.
4. On October 30, 2000,¹ claimant mailed to respondent and its insurance carrier's attorney a Demand for Payment reciting language from the September 29, 2000 preliminary hearing order and requesting payment of \$3,830 for 10 weeks of temporary total disability benefits, less \$2,136.40 that had been paid on or about October 16, 2000. Claimant's demand read:

COMES NOW claimant and demands payment of the temporary total disability benefits awarded by Administrative Law Judge Brad E. Avery on September 22, 2000, in the amount of \$383.00 per week, "commencing August 27, 2000 until further order, or until certified as having reached maximum medical improvement; or released to regular job; or until returned to gainful employment, whichever occurs first."

Claimant is entitled to 10 weeks of temporary total disability at the rate of \$383.00 per week or \$3,830.00 less \$2,136.40 paid on or about October 16, 2000.

¹ The second page of the demand states that it was mailed October 30, 1999, but that was no doubt a clerical error.

The exhibits to the penalties hearing indicate that respondent and its insurance carrier's attorney received a copy of the demand but the record does not disclose the date of that receipt.

5. The parties again appeared before the Judge for a February 13, 2001 preliminary hearing. The hearing was held at respondent and its insurance carrier's request to terminate temporary total disability benefits. At that hearing no comments were made about claimant not receiving the four temporary total disability benefits checks in question. At the hearing, however, a February 1, 2001 deposition of claimant was submitted to the Judge in which claimant testified that his mother had received a temporary total disability benefits check in January 2001 but that was the only check that she had received in the preceding three or four months.

6. On February 18, 2002, this claim went to regular hearing. At that hearing the Judge and parties narrowed the issues to be addressed by the Judge in the final award. Claimant's counsel did not raise as an issue the four temporary total disability benefits checks in question. Instead, claimant's counsel indicated that the only additional weeks of temporary total disability benefits that claimant was seeking represented the period from February 13, 2001, through May 31, 2001.² Claimant testified at the hearing but he did not testify regarding the four temporary total disability benefits checks in question.

7. The Judge issued a final award in this claim on April 26, 2002, followed by a May 1, 2002 Nunc Pro Tunc Award. As the parties had not raised receipt of the four temporary total disability benefits checks as an issue, neither the Award nor the Nunc Pro Tunc Award addressed them.

8. Claimant appealed the April 26, 2002 Award and May 1, 2002 Nunc Pro Tunc Award to this Board. On November 27, 2002, the Board entered its Order which awarded claimant, among other benefits, temporary total disability benefits from the date of accident on March 8, 2000, through December 3, 2001, a period of 90.71 weeks. The Board's Order also awarded claimant 14.89 weeks of permanent partial disability benefits for a 15 percent functional impairment to the right lower leg.

9. On December 2, 2002, claimant sent a Demand for Payment to respondent and its insurance carrier's attorney. Claimant referenced the Board's November 27, 2002 Order and demanded payment of \$36,775.20, less the amounts previously paid. The demand read:

² R.H. Trans. at 5.

COMES NOW claimant and demands payment of the award entered by the Appeals Board on the 27th day of November, 2002, pursuant to K.S.A. 44-512a, to wit:

Dustin Bennett is granted compensation from Scott Masonry, Inc., and its insurance carrier for a March 8, 2000 accident and resulting disability. Based upon an average weekly wage of \$522.35, Mr. Bennett is entitled to receive 90.71 weeks of temporary total disability benefits at \$348.25 per week, or \$31,589.76, plus 14.89 weeks of permanent partial disability benefits at \$348.25 per week, or \$5,185.44, for a 15 percent permanent partial disability, making a total award of \$36,775.20, which is all due and owing less any amounts previously paid.

Claimant shows that the sum of \$36,775.20, less amounts previously paid, is due and owing at this time.

The exhibits attached to the penalties hearing transcript indicate that respondent and its insurance carrier's attorney received a copy of the demand on December 3, 2002, and that the insurance carrier received a copy of the demand on December 5, 2002.

10. On December 31, 2002, respondent's insurance carrier issued a check to claimant and his attorney in the sum of \$8,208.69, which represented the balance of claimant's award after deducting \$24,285.89 that respondent's insurance carrier believed had been previously paid to claimant and after deducting \$4,280.62 that the insurance carrier paid on claimant's behalf for outstanding child support.³ The record does not disclose when either claimant or his attorney received that check.

11. On January 2, 2003, claimant's attorney filed a Motion for Civil Penalties with the Division of Workers Compensation. In that motion, claimant requested a "penalty of \$100 per week for each and every week any payment has not been paid when due, pursuant to the award entered by the Appeals Board on the 27th day of November, 2002, pursuant to K.S.A. 44-512a." The motion concluded by requesting that the penalties be assessed from December 25, 2002, until the award was paid in full.

12. On January 31, 2003, the parties appeared before Judge Avery on claimant's request for penalties. Claimant testified that he did not receive four checks that were issued by respondent's insurance carrier on November 9, 21, 27, and 30, 2000, all of which totaled \$1,248.95. At that hearing, claimant testified that he believed his estranged

³ The parties represented to the Board at oral argument that the four temporary total disability benefits checks in question had not been reissued.

common-law wife had taken the checks from his mother's mailbox without permission and cashed them.

13. Contrary to the request that claimant's attorney had made in his October 2, 2000 letter to respondent and its insurance carrier's attorney, the four checks in question were neither mailed to claimant's attorney's office nor did they include claimant's attorney's name as a payee.

14. The record does not disclose when claimant or his attorney first notified respondent or its insurance carrier that the four November 2000 checks in question had not been received or that claimant's signature had been allegedly forged. But the exhibits to the penalties hearing contain a January 15, 2003 letter from the insurance carrier to claimant's attorney in which the insurance carrier enclosed copies of the four checks that claimant contends were stolen.

CONCLUSIONS OF LAW

Claimant's request for penalties should be denied. Accordingly, the January 31, 2003 Order for Penalties should be reversed.

The penalties statute, K.S.A. 44-512a, provides, in part:

(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, **is not paid when due** to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written **demand for payment, setting forth with particularity the items** of disability and medical compensation **claimed to be unpaid and past due**, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

(b) After the service of such written demand, if the payment of disability compensation or medical compensation set forth in the written demand is not made within 20 days from the date of service of such written demand, plus any civil penalty, as provided in subsection (a), if such compensation was in fact past due, then all past due compensation and any such penalties shall become immediately due and payable. Service of written demand shall be required only once after the

final award. Subsequent failures to pay compensation, including medical compensation, shall entitle the employee to apply for the civil penalty without demand. . . . (Emphasis added.)

The request for penalties for the nonpayment of the temporary total disability benefits that represent the checks which claimant contends were stolen should be denied as claimant's December 2, 2002 demand was premature as it was filed during the period that the parties could have appealed the Board's November 27, 2002 Order.⁴ Thus, when claimant demanded payment in December 2002, the Board's award was not final and the benefits due under that award were neither due nor owing. Likewise, claimant has failed to establish that when he served the October 2000 demand for payment on respondent and its insurance carrier that the temporary total disability benefits representing the four November 2000 checks in question were due and owing.

Furthermore, claimant's request for penalties must be denied as both the October 2000 demand and the December 2002 demand lacked the specificity and particularity required by K.S.A. 44-512a. Neither demand mentions the specific weeks or the four temporary total disability checks in question.

AWARD

WHEREFORE, the Board reverses the January 31, 2003 Order for Penalties. Accordingly, the Board denies claimant's request for penalties.

IT IS SO ORDERED.

Dated this ____ day of August 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

⁴ See *Hallmark v. Dalton Construction Co.*, 206 Kan. 159, 476 P.2d 221 (1970).

c: Frank D. Taff, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director